

3rd National Anti-Money Laundering Conference

Prosecuting Money Laundering Crimes

9 November 2011
Holiday Inn, Suva

TOPIC: **Fiji's Legal Framework for Anti-Money Laundering**

Speaker: **Madam Nazhat Shameem**

Position: **Former High Court Judge and
Former Director of Public
Prosecutions**

The origins of laundering money

- The slave trade?
- Al Capone
- Meyer Lansky
- Pablo Escobar
- BCCI
- Benex Worldwide

Fiji

- Proceeds of Crime Act
- Financial Transactions Reporting Act
- Mutual Assistance Act
- Extradition Act
- The Bribery Promulgation
- Crimes Decree
- Anti-Money Laundering Council
- Police Force
- DPP's Office
- Judiciary

The Nature of Money Laundering

- Placement
- Layering
- Integration

The Financial Transactions Reporting Act

- Reserve Bank powers were inadequate to police individual transactions
- Narrow definition of “bank” and “financial institution”
- The FTR Act has a broad definition of “financial institution”
- Reporting cash transactions of more than \$10,000
- All international transactions
- All suspicious transactions
- The Financial Intelligence Unit
- The Anti-Money Laundering Council

Section 25(2)

- Power to apply through the AG to the High Court to stop a financial institution from carrying out a transaction
- This is additional to the restraining order regime in the Proceeds of Crime Act which only empowers the DPP to make the application

Section 28 powers

- Enter premises with or without a warrant
- Seize documents
- Copy documents
- Access computer records
- Transmit information to similar units overseas
- Obstruction of the Unit is a criminal offence
- Section 16 – financing of terrorism – as defined in interpretation section
- The Unit is an intelligence gathering body, it does not prosecute

Proceeds of Crime Act 1997

- Amended in 2004
- Intended to take the profit out of crime
- Intended to create offences of money laundering
- Intended to criminalise placement, layering and integration
- Restraining orders
- Forfeiture orders with or without conviction
- Tainted property
- Serious offence
- Proceeds of Crime
- Pecuniary Penalty Orders

Sections 69

- \$120,000 fine and /or 20 years imprisonment
- If a body corporate - \$600,000 fine
- **Directly or indirectly**
- Engaging in a transaction, receiving, concealing, using, disposing of, or bringing into Fiji
- **Proceeds of crime**
- Or converts, transfers, money or other property derived directly or indirectly from a serious offence or a foreign serious offence
- With the aim of concealing the illicit origin or conceals or disguises the origin
- Or helps another doing the above
- And the accused **knows or ought reasonably to know** that the money or property was derived **from some unlawful activity**

Section 70

- Lower standard of mens rea (objective test)
- Property that may reasonably be suspected of being proceeds of crime
- \$12,000 fine and/or 2 years imprisonment
- Defence if the accused satisfies the court that he/she had no reasonable grounds to suspect that the property was derived or realised from unlawful activity (burden on accused)

Judicial Response

- O' Keefe
- Salendra Sen Sinha
- Anand Kumar Prasad – civil forfeiture, recusal, sentence
- Illogical sentencing approach
- If the accused is only charged with money laundering, he or she will get 8 to 12 years. If he or she is charged with fraud corruption and money laundering, he or she will get 2 or 6 years!

The Answer?

- Create a tariff for money laundering without reference to the other offences
- Sentence for all offences on the basis of the tariff approach
- Take into account the scale and gravity of the laundering
- Take into account the level of organisation
- Take into account the level of involvement of the offender
- Adjust for proportionality
- Then decide on concurrent or consecutive sentences

Other provisions

- Extradition Act
- Mutual Assistance Act
- Crimes Decree – corruption, fraud, and theft
- FICAC and the DPP's Office – enforcement expertise

The UK legislation

- The 2002 Proceeds of Crime Act
- Amalgamates financial reporting, and money laundering
- Maximum penalty – 14 years imprisonment plus a fine
- Guidelines issued by the UK Bar Council, Law Society, Institute of Chartered Accountants and the Joint Money Laundering Steering Group
- “Criminal property”
- The offender **knew or suspected** that the benefit was from **criminal conduct**
- Test is subjective, criminal conduct is narrow and penalty is lower

Judicial response in the UK

- Legal practitioners have been prosecuted (Bowman v. Fels)
- Banks have been prosecuted for failing to report (Squirrel v. National Westminster Bank)
- Failure to declare income not necessarily “criminal” conduct (Rv. Gabriel)
- Under declaring profit to Inland Revenue said to constitute a benefit in R v. K(l)
- Receiving stolen property is a form of money laundering (R v. Rose, Rv. Whitwan)
- The sentence for money laundering should not hinge on the sentence for other offences on the indictment (R v. Monfries, R v. Gonzalez and Sarmiento)

Sentences

- 27 months for an estate agent who bought a house at under market value from a drug dealer (R v. Griffiths and Pattison)
- 6 months for a solicitor who carried out a conveyance of a house at an under market value (R v. Duff)
- Compare with Fiji
- O'Keefe – 3 ½ years
- Sinha – 2 years with 18 month non-parole period
- Anand Kumar Prasad – 6 years
- Note Fiji has a higher maximum sentence

Conclusion

- The law provides adequately for placement, layering and integration
- Money Laundering covers all three stages and all three are criminalised
- Reporting obligations in the FTR cover placement , integration and layering (all suspicious transactions)
- Mingling of property is covered
- Forfeiture can be ordered without trial
- The FIU has strong intelligence-gathering powers
- Prosecutions are still rare
- The judicial response has been mixed, although the High Court has taken a firm line with length of sentences
- No prosecutions of financial institutions
- Laundering usually a crime of the rich
- Effective implementation is about the rule of equality before the law

- Nazhat Shameem
- Barrister and Solicitor
- 9th November 2011